United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Dismissed motion of May 7

76-6044

To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

Docket No. 76-6044

WILLIAM BARTH, as parent and natural guardian of DEBORAH BARTH, an infant, and WILLIAM BARTH, individually,

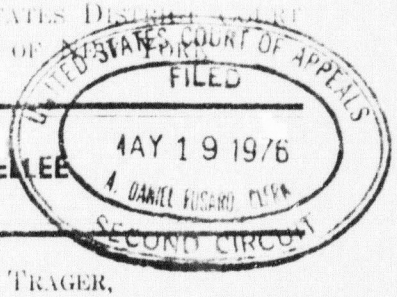
Plaintiffs-Appellants,

—against—

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR APPELLEE

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Of Counsel.

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BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by plaintiffs below, William Barth, individually, and on behalf of his infant daughter, from a final decision by Thomas C. Platt, District Judge, in favor of defendant entered in the United States District Court for the Eastern District of New York on November 11, 1975. Jurisdiction was vested in the district court pursuant to 28 U.S.C. § 1346(b) and the instant appeal is properly before this Court pursuant to 28 U.S.C. § 1291.

Appellants sought to recover damages under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2681) for the injuries suffered by Deborah Barth on June 24, 1972, when she fell through an open hatch in the floor of the catwalk of the United States Coast Guard tower located at Democrat Point (Fire Island), New York.

The trial court held that Miss Barth was contributorily negligent in failing to observe the open hatch and in running around the narrow catwalk. On this appeal, appellants contest that determination and, furthermore, contend that the negligence of the Government was so gross or wanton that even if Miss Barth failed to exercise due care on her own behalf, her contributory negligence would not bar recovery. Finally, appellants argue that the district court erred in failing to apply retroactively New York's recently adopted comparative negligence statute (L. 1975, c. 69, N.Y.C.P.L.R. §§ 1411-1413).

The government takes the position that Miss Barth was contributorily negligent and assumed the risk of her injuries, and that the Coast Guard was not negligent in its maintenance of the tower. We further contend that the trial court correctly refused to apply the provisions of the comparative negligence law retroactively in view of the explicit language of the statute and, accordingly, that Miss Barth's contributory negligence bars any recovery.

Counter-Statement of the Issues Presented

1. Was the United States of America chargeable with ordinary negligence in its maintenance of the Coast Guard tower? (The court below implicitly rejected appellants' claim that the government was grossly or wantonly negligent and held that only ordinary negligence was involved).

2. Was Deborah Barth contributorily negligent with respect to this accident? (The court below held in the affirmative on this issue).

3. Did Deborah Barth assume the risk of her injuries? (The court below did not expressly address this issue).

4. Did the court below err in refusing to apply the law of comparative negligence to this action?

Statement of the Case

The opinion of Judge Platt (247a-258a)[1] sets forth the uncontested facts and offers a comprehensive discussion and summary of the evidence in the case. We address ourselves to basic facts elicited from the witnesses and the conflicts in evidence which the trial judge was called upon to resolve to reach his conclusion that both plaintiff and defendant were negligent.

Plaintiffs-Appellants' Case

The plaintiffs' case below consisted of the testimony of Deborah Barth and her boyfriend, Alan Peers, together with a number of photographs[2] and exhibits introduced into evidence at trial.

Miss Barth testified that she arrived at Fire Island at about 10:00 A.M. (30a, 41a) and joined a group of her friends (30a). Later that day (30a, 41a), she walked to the tower with some of her companions (31a) and, after lifting herself onto the cement base of the tower, ascended the center stairs (32a) to a room enclosed by a three-foot high wall (36a). Eileen Gallagher, Victor Behrend and Alan Peers also climbed the tower (37a).

After she reached the tower watchhouse, Miss Barth climbed over the three-foot high wall onto the catwalk encircling the watchhouse and looked down at the water (37a); while doing so, she moved to the right, took a

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[1] Numerals followed by a lower case "a" refer to pages in the Appendix.

[2] Almost all of the photographs introduced into evidence by plaintiffs below show the open hatch through which Miss Barth fell, making it clear that the "dangerous condition" was obvious to anyone who walked towards or climbed the tower.

step backward, turned and fell through the catwalk hatch (38a, 51a, 52a, 62a).

Miss Barth was 14½ years old at the time of this accident and had just completed the eighth grade (29a). On cross-examination, she admitted that she was aware on the date of the accident that the tower was "very tall" and, had she thought about it, she would have realized that a fall from the tower would mean severe injury (41a). Furthermore, once she had reached the watch-house she was concerned about the danger of falling (58a-59a) but nevertheless climbed over the wall to the catwalk. Miss Barth also admitted that although the catwalk hatch is visible in Plaintiffs' Exhibits 1, 3 and 4,[3] she did not see the open hatch because she "never looked" at the top of the tower, even as she approached it from a distance (45a).

Miss Barth completed her testimony by denying that there had been any laughter or running on the tower during the period she was on it (60a).

Alan Peers testified on direct examination that he first went to the tower in 1961, that he had visited and climbed the tower at least 200 times since 1961, as had many other children and teenagers, that since 1961 the tower had not been in use by the Coast Guard, that the catwalk hatch had always been uncovered, that there had never been a ladder leading from the hatch to the center stairs, and that he had never seen any signs, fences or barricades on or about the tower during this entire period (154a-158a).[4]

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[3] These are the photographs referred to previously.

[4] Almost every facet of Mr. Peers testimony in this regard was rebutted by the testimony of the defendant's witnesses Daniels and Zammit, discussed *infra*. As an illustration of the unreliability of Peers' testimony, we note that Judge Platt found that the tower was erected in 1965 and, therefore, Peers could not have climbed it in 1961 (251a).

Mr. Peers then confirmed Miss Barth's version of how she fell (162a), but was forced to admit on cross-examination that if he observed Miss Barth's movements, it was just as he emerged through the floor of the watch-house at the top of the main stairs.[5]

Defendant-Appellee's Case

In its defense to this action, the government called as witnesses the four remaining companions of Miss Barth on the day of the accident, Eileen Gallagher, Victor Behrend, Rosalie Rozzo and Robert Castelli. Their combined testimony established that any "dangers" presented by climbing the tower were open and obvious to all (86a, 88a, 118a, 128a, 231a). Furthermore, and most significantly, their testimony established that Miss Barth was injured after she grabbed a cigarette out of Mr. Peers' hand (121a) and started running, as if playing a game (121a). It was while Miss Barth was running around the catwalk of the tower that she plunged through the open hatch (121a, 129a-132a, 141a, 147a).

The eyewitness testimony also established that there had been laughter emanating from the tower just prior to Miss Barth's fall (142a, 230a) and that voices had cried out "Give me my cigarette back" (230a) and "You can't have it!" (131a).

The defense also offered into evidence the testimony of Lt. Commander William Aliff and Lt. Amos Daniels[6]

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[5] As stated by the trial court in its decision,

> [t]he government's proof, however, showed that a person climbing the main ladder through the main hatch would be facing north or 180 degrees away from the escape hatch in the catwalk. (251a.)

[6] Lt. Daniels had retired from the Coast Guard prior to the trial of this action and was not available as a witness. Accordingly, his pre-trial deposition was introduced into evidence as Defendant's Exhibit F. The deposition is reproduced in the Government's Supplemental Appendix (A. 1-A. 31).

of the United States Coast Guard, and Alan Zammit, a civilian engineer employed by the Coast Guard, as well as a number of exhibits.

Lt. Commander Aliff had been the Fire Island Coast Guard station commander during 1968-1970, and indicated that the tower was frequently vandalized during this period (65a). While no personnel were specifically assigned to the tower, Guardsmen passing by on their way to a nearby radio beacon would frequently check the condition of the tower (66a-67a), and Lt. Commander Aliff ordered "no trespassing" signs placed around the base of the tower (67a). The signs were replaced whenever it was discovered that they were missing, which was approximately every 3-4 months (68a).

Subsequent to succeeding Lt. Commander Aliff as station commander, Lt. Daniels did not have any occasion to inspect the tower prior to the Barth accident (Daniels' Deposition at 5-6, (A. 5-A. 6), but was told by his Executive Officer that signs were posted on and about the tower and that "there had been a continuous program of keeping the signs on . . ." (*Id.* at 8, A. 8). During the period of his command, 1970-1973, Lt. Daniels had no knowledge of any person using the tower for recreation or sightseeing (*Id.* at 8-9, A. 8-A. 9).

After Miss Barth's fall, Lt. Daniels went out to the tower to take photographs and found the tower in "very good condition" overall (*Id.* at 14-15, A. 14-A. 15).

Mr. Zammit, a supervisory civil engineer employed by the Coast Guard, testified that in his official capacity he had reviewed all documents pertaining to the tower and found that the tower had been erected at Democrat Point in 1965, having previously been situated some 2½ miles away at the Fire Island Coast Guard station itself;

there had been no tower at Democrat Point prior to 1965 (191a, 217a). According to Mr. Zammit, the records maintained by the Coast Guard revealed no prior accidents at the tower or complaints about its condition (194a).

Mr. Zammit also established that there had been a stairway leading from the beach to the top of the concrete base, but these stairs had been removed prior to the accident (197a). Mr. Zammit made it clear that the emergency ladder leading from the catwalk hatch to the main stairs was intact on the date of the accident (198a-199a) and that the tower had been designed to include a 35 lb. hinged catwalk hatch cover (200a). The Coast Guard did not remove the cover, did not order its removal, and did not know that the cover had been removed prior to the accident (202a).

Mr. Zammit's testimony further established that a person, such as Mr. Peers, climbing the main stairs would be facing directly away from the catwalk hatch as he approached the watchhouse (203a).[7]

Decision Below

This matter was tried on August 27 and 28, 1975. Both sides rested on the latter date and decision was reserved.

In an unreported opinion and order dated November 11, 1975 (247a-259a), Judge Platt held the government's maintenance of the tower to be negligent (255a), but

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[7] As previously indicated, the testimony of defendant's witnesses *vis-á-vis* the history and condition of the tower completely contradicted the incredible testimony of appellants' sole corroborating witness, Alan Peers.

"credit[ing] the testimony of the government's witnesses" (253a), found that Miss Barth

> took a cigarette from Mr. Peers and started to run in a westerly direction along the southerly catwalk, looking over her shoulder to the right, and there was laughter and fooling and kidding around and someone (probably Mr. Peers) said "give me my cigarettes back", and Miss Barth continuing in such fashion, ran around the southeasterly corner and stepped through the escape hatch and fell to the sand below. (254a.)

Accordingly, and for a number of reasons (255a-256a), the court below held Miss Barth's conduct to be contributory negligence, barring her father's claims (258a).

ARGUMENT

POINT I

The Government was not negligent in its maintenance of the tower.

In Points I and IV of their brief appellants argue that the Government was grossly negligent in maintaining an "inherently dangerous" condition. In spurious analogies to cases involving bombs, spring guns, rotted structures and uninsulated high voltage lines, appellants attempt to equate the Coast Guard tower to an ultrahazardous instrumentality or condition (Appellants' Brief at 7-11). In Points II and III, appellants state some general principles applicable to personal injury claims by trespassing children. Reduced to its simplest terms, the instant case turns on two basic issues: what was the standard of care imposed by law on each of the parties? Did the conduct of each of the parties conform to that standard?

It is our contention not only that there is no basis to credit appellants' assertion that the Government was grossly negligent but also that the trial court was in error in finding ordinary negligence on the part of the Government.

Appellants rely on *Martinez* v. *Kaufman-Kane Realty Co., Inc.*, 34 N.Y. 2d 819, 359 N.Y.S. 2d 51 (1974) as the controlling exposition of New York law in this area. In *Martinez*, the Court of Appeals adopted the principles of the Restatement 2d, Torts for determining the standard of care in landowner liability cases. Specifically, § 339 of the Restatement sets forth the factors to be considered:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Subparagraph (a) requires that the possessor of land have actual knowledge, or be apprised of sufficient facts from which a reasonable person would conclude, that children were likely to trespass. The testimony of the Coast Guard personnel that defendant lacked actual knowledge was clearly not credibly refuted by the statements of Peers or Behrend that on previous visits to the tower they had seen children. Neither did their testimony on the fact that "no trespassing" signs were removed from time to time prove that the Government had reason to know that children climbed the tower.

> The possessor is under no duty to make any investigation or inquiry as to whether children are trespassing, or are likely to trespass, until he is notified, or otherwise receives information, which would lead a reasonable man to that conclusion. (Restatement 2d, Torts § 339, comment g).

Section 339(b) requires, as a condition of liability, that the defendant knew or had reason to know that the tower represented an unreasonable risk to children such as Miss Barth. Plaintiffs adduced no evidence in this regard and, in fact, the defendant affirmatively established that there had been no prior accidents or complaints about the tower, *Moore* v. *Bd. of Education*, 22 A.D. 2d 919, 255 N.Y.S. 2d 540 (2d Dep't 1964), *aff'd*, 19 N.Y. 2d 621, 278 N.Y.S. 2d 406 (1967); *Duffy* v. *Owen A. Mandeville, Inc.*, 3 A.D. 2d 756, 160 N.Y.S. 2d 97 (2d Dep't 1957).

It is doubtful that under New York law the tower would be considered an unreasonable risk, let alone a lethal trap, such as a defective fire escape overhanging a sidewalk, *Martinez, supra.* In *Londa* v. *Dougbay Estates*, 50 A.D. 2d 925, 377 N.Y.S. 2d 205 (2d Dep't 1975), the New York court refused to hold that building equipment left on land where trespassing children played constituted a "trap." The building equipment, wrote the court, "was

large and readily observable. It was exactly what it appeared to be." *Id.* at 926, 377 N.Y.S. 2d at 206.

Subparagraph (c) focuses on children's lack of perception of a dangerous condition and their failure to appreciate some perils. But,

> There are dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. (Restatement 2d, Torts, § 339, comment (j)).

Miss Barth, 14½ years of age at the time, admitted that she would have realized the danger in climbing the tower had she thought about it; furthermore, she admitted being afraid of falling off the catwalk because she might be hurt badly. Moreover, her friend, Eileen Gallagher (13 years old at the time) recalls being scared. Rosalie Rozzo, 14, did not climb the tower, and Robert Castelli, 18, thought it was "unsafe" to do so. Judged by her own admissions and the conduct of her peers, we submit that a reasonable teenager would, and Miss Barth did, realize the risk involved in ascending the tower and in running about the narrow catwalk.

Subparagraph (d) deals with the balancing of the risk in relation to the utility of the condition and the burden of eliminating the danger. It is submitted that appellant failed entirely to prove that the risk posed by a Coast Guard tower distant from any popularly frequented area was of such magnitude that the government would be compelled to remove it or make it inaccessible even to venturesome teenagers.

And finally, if all the foregoing conditions are met, the possessor, according to subparagraph (e) must exercise reasonable care to eliminate the dangers. Appellants'

proof did not meet the requirements of (a) through (d). In addition, we believe that the Coast Guard acted reasonably in regularly observing the condition of the tower, posting signs and removing the access ladder, and that no more was required for a structure well removed from a populated area.

In view of the absence of appellants' proof that the appellee's conduct was negligent, the Government takes the position that there is not the slightest tinge of color to the claim that it acted in a grossly or wantonly negligent manner in the maintenance of the tower. To be chargeable with this degree of negligence would require a finding that the Government maintained a dangerous trap involving hidden and extreme perils. As a matter of fact, photographs of the tower portray that the open hatch was visible from almost any angle and from some distance away from the structure. Defendant also established that the tower was in "very good condition" overall. Confirming our view that the tower was not an inherently dangerous structure by design, we may refer to the findings of the court in *McGill* v. *United States*, 105 F. Supp. 719 (E.D. Pa. 1952), *rev'd on other grounds*, 200 F.2d 873 (3d Cir. 1953), describing a similar tower as "a solid, sound structure containing no defects and no hidden dangers."

The New York Court of Appeals has drawn a distinction, in assessing a landowner's liability, based on the condition of the structure maintained on his property. It agreed with the court in *Runkel* v. *City of New York*, 282 App. Div. 173, 123 N.Y.S. 2d 485 (2d Dep't 1953), that an "abandoned open structure which is so rotted and dilapidated that it is in imminent danger of collapse may be said to constitute a trap or an 'inherently dangerous' instrumentality, thereby casting the owner in liability if he fails to prevent foreseeable injury to others, including trespassers . . ." But where the structure was simply in a state of disrepair, not in "imminent danger of collapse

and thus a trap or an inherently dangerous structure", the Court of Appeals held the owner not liable to the trespasser for injuries sustained. *Beauchamp* v. *New York City Housing Authority*, 12 N.Y. 2d 400, 405, 240 N.Y.S. 2d 15, 20 (1963).[8]

POINT II

Deborah Barth was contributorily negligent and assumed the risk of her injuries.

The trial court correctly held that Miss Barth's claim was barred by her contributory negligence. The government also contends, as it did below, that her assumption of risk precludes recovery.

The facts pertaining to Miss Barth's conduct while on the tower were carefully evaluated by the trial judge from the testimony; he noted the variance between the statements of Miss Barth and her close friend (Peers) and those of her other companions as to the location of the hatch and the activities of Miss Barth on the tower.

> With respect to the behavior of the plaintiff after climbing the steps to the watchtower, the

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[8] Assuming, *arguendo*, that the claim that children frequently visited and climbed the tower entitled plaintiff to the status of a licensee, it is clear that she still could not succeed in this action. Defendant's traditional duty to a licensee is to warn him or her of hidden dangers known to the defendant. As pointed out above, in this case defendant *did not know* of any problems with the tower other than vandalism and *did* post "no trespassing" signs. There were *no hidden dangers;* the open hatch through which Miss Barth ultimately fell could be seen from hundreds of feet away, and plaintiff's visit occurred in early afternoon. *Compare Fitzsimmons* v. *State*, 42 A.D. 2d 636, 345 N.Y.S. 2d 171 (3d Dep't, 1973), *aff'd*, 34 N.Y. 2d 739, 357 N.Y.S. 2d 498 (1974).

Court feels that the sympathies and interests of the witnesses, Gallagher, Razzo, Behrend and Castelli lay definitely with Miss Barth but nonetheless each of them related a consistent description of her conduct which was far different from that related by Miss Barth and her close friend, Mr. Peers. Under the circumstances, the Court must credit the testimony of the government's witnesses and find that:

1. The main hatch was located in the northeast corner of the square room.

2. The escape hatch was located on the south side about four feet from the southeast corner of the catwalk.

3. Moments before the accident Mr. Behrend and Miss Barth were standing near the northeast corner on the east side of the catwalk and Mr. Peers was standing on the northeast corner of the square room facing the catwalk.

4. Miss Barth took a cigarette from Mr. Peers and started to run in a westerly direction along the southerly catwalk, looking over her shoulder to the right, and there was laughter and fooling and kidding around and someone (probably Mr. Peers) said "give me my cigarettes back," and Miss Barth, continuing in such fashion, ran around the southeasterly corner and stepped through the escape hatch and fell to the sand below (253a-254a)."

The court found that the escape hatch was clearly visible from the beach and to anyone climbing the tower, and that Miss Barth perceived the dangers in climbing a structure of this height (255a-256a). Nonetheless, she did nothing "to guard against such obvious and known

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"See testimony of witnesses Behrend, Rozzo and Castelli (121a, 141a-142a, 230a).

dangers and risks" but proceeded to "horse around" while on the narrow catwalk (*Id.*, at 256a).

Miss Barth was an alert, articulate girl of 14½ years of age and had completed her eighth grade before the accident occurred. She was under no physical or mental disability which prevented her from appreciating the situation and, to the contrary, admitted realizing the dangers. Accordingly, it is submitted that the court below correctly held her contributorily negligent in taking unnecessary risks, failing to discover the open hatch, and engaging in horseplay while on the catwalk. *Camardo* v. *New York State Railways*, 247 N.Y. 111, 115, 159 N.E. 879, 880 (1928).

In addition to her contributory negligence, Miss Barth assumed the risk of her injury. The paramount danger of ascending a high tower and cavorting about a narrow catwalk on the rim was the peril of falling. A reasonable youth of like age, experience and knowledge would have perceived this risk and Miss Barth in her testimony acknowledged that she appreciated the danger. *Jones* v. *Kent*, 35 A.D. 2d 622, 312 N.Y.S. 2d 782 (3d Dep't, 1970).

The fact that she disclaimed observing the open hatch is not decisive.

> Since the basis of assumption of the risk is not so much knowledge of the risk as consent to assume it, it is quite possible for the plaintiff to assume risks of whose specific existence he is not aware . . . He may, in other words, consent to take his chances as to unknown conditions. Prosser, Law of Torts 449 (4th ed. 1971).

Miss Barth plainly and deliberately chose to subject herself to the hazard of the tower, which was made difficult of access by the government's removal of the ladder.

After attaining the dangerous height, she engaged in horseplay on the narrow rim. Her conduct manifested an unreasonable assumption of risk, *Cadieux* v. *Bd. of Education*, 25 A.D. 2d 579, 580, 266 N.Y.S. 2d 895, 896 (3d Dep't 1966), which is a complete defense to any liability on the part of the government.

POINT III

The trial court correctly refused to apply the law of comparative negligence to this case.

Subsequent to the close of trial (but prior to the rendering of the decision appealed from), plaintiffs moved below for the retroactive application to this case of the comparative negligence law enacted by the legislature of New York in 1975 (L. 1975, c. 69). The motion was denied, and appellants challenge this decision as well.

Plaintiffs commenced this suit pursuant to the Federal Tort Claims Act, specifically, 28 U.S.C. § 2674, which provides in pertinent part:

> The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . .

This statute has been judicially interpreted and it is undisputed that it requires liability to be determined in accordance with the state law which would govern if the defendant were not the United States Government. *United States* v. *Muniz*, 374 U.S. 150, 153 (1963).

The accident underlying the case at bar occurred in New York, the plaintiffs are New York residents, and the parties and the district and this court have proceeded to date on the assumption that New York substantive law is controlling. We submit that New York courts would not apply the comparative negligence statute retroactively

and that the district court, therefore, was correct in refusing to do so.

In adopting comparative negligence, the New York Legislature made it clear that the rules set down would apply prospectively only, stating:

> This article shall apply to all causes of action accruing on or after September first, Nineteen hundred seventy-five.[10] (N.Y.C.P.L.R. § 1413).

While the New York courts have not as yet passed upon the retroactivity of the statute, it is clear that they are fully prepared to respect the Legislature's decisions regarding the implementation of comparative negligence in New York; *see, e.g., Codling* v. *Paglia*, 32 N.Y. 2d 330, 345 N.Y.S. 2d 461 (1973), where the Court of Appeals stated (32 N.Y. 2d at 345, 345 N.Y.S. 2d at 472):

> With full awareness that the doctrine [of contributory negligence] was one of judicial rather than legislative origin, we are nonetheless not prepared at this time to substitute some formula of comparative negligence. In our opinion *this is a topic more appropriate for legislative redress.* [*Emphasis added.*]

See, also, Maki v. *Frelk*, 40 Ill. 2d 193, 196, 239 N.E. 2d 445, 447 (1968).

Bissen v. *Fujii*, 466 P.2d 429, 430 (Haw. 1970), and *Heafer* v. *Denver-Boulder Bus Co.*, 489 P.2d 315, 316 (Colo. 1971) treat this specific issue. In *Bissen, supra*,

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[10] In his 1975 Practice Commentary to § 1413, Dean McLaughlin states: "Removing all doubts as to the retroactivity of the new provision, this section states emphatically that it applies only to causes of action accruing on or after September 1, 1975.

the Hawaii statute declared that the law ". . . shall not be retroactive and shall affect only those claims accruing after its effective date." The Hawaii Supreme Court, relying on the quoted language, refused to apply the statute retroactively to a cause of action accruing prior to the effective date. 466 P.2d at 430.

Similarly, in *Heafer*, *supra*, the Supreme Court of Colorado, citing *Bissen*, *supra*, refused retroactive effect to the statute which "specifically provides that it shall take effect . . . and shall apply only to actions arising out of events which occur on or after such date." 466 P.2d at 316. *See*, *also*, *Joseph* v. *Lowery*, 261 Ore. 545, 495 P.2d 273 (1973), and *Reddell* v. *Norton*, 225 Ark. 643, 285 S.W. 2d 328, 133 (1955).

Counsel for appellants relies solely on *Godfrey* v. *Washington*, 84 Wash. 959, 530 P.2d 630 (1975), a totally inapposite case. In *Godfrey*, the applicability of the statute was not keyed to *accrual* of the cause of action; rather, the legislature declared that the act constitute the law of decision for all cases pending in the Washington State courts on or after a date certain, without regard to the time the cause of action accrued. Clearly, appellants' reliance on *Godfrey* is misplaced and the trial court was correct in the ruling challenged on this appeal.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: Brooklyn, New York
May 17, 1976

Respectfully submitted,

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★ U. S. Government Printing Office 1976 — 614—350—209

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of May 19 76 he served ~~a copy~~ two copies of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Harry H. Lipsig, P.C.
100 Church St.
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
19th day of May 19 76

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977